



# **Nevada Division of Water Resources**

Enforcement of Nevada Water Law  
2<sup>nd</sup> Round of Workshops



# Why Are We Here?

1. Water availability and water issues reaching critical mass
  - Nevada is the driest state in the nation
  - Fastest growing state for 20 of the past 21 years
2. Although Nevada's Water Law has been in place for over 100 years, the existing statutes don't provide for an effective way to enforce the protective laws
3. Conserving the Resource and Protecting the Waters of the State
  - The Right Thing To Do
  - Water pumped in excess of a basin's perennial yield is nonrenewable
4. Protect Existing Water Rights and Domestic Wells



# Why Are We Here?

Understanding that water is the state's most precious resource, the 2007 Legislature determined that Nevada must have an effective way to enforce Nevada's laws that protect Nevada's water.

To accomplish this, Senate Bill 274 was passed which puts into place a mechanism for ensuring protection of Nevada's water.



# Is Enforcement, Which Includes Potential Fines and Penalties, Necessary?

- Twelve (12) other western states were polled. All 12 had the ability to enforce their water law by assessing fines – two have the ability to fine up to \$10,000 per day plus require the replacement of water.
- Having the ability to assess fines and penalties has proven effective in those states in management of the resource.



# Fines & Penalties

What do we currently have?

- No ability to assess a fine
- Ability to issue an administrative order to cease and desist
- Ultimately, violator may be guilty of a misdemeanor crime
  - Must get Deputy Attorney General involved
  - This entire process takes significant time (several years), effort and taxpayer money. Even though this process exists, the penalty hasn't effectively deterred a person from committing the violation.
- Entire process is cumbersome at best.



# Fines and Penalties

Example of Actions Currently being taken to Achieve Compliance for over pumpage in Las Vegas:

- Since 2003, over 17,000 over pumpage letters have been sent out, many to the same repeat offenders, in an attempt to achieve compliance. As a result of those notifications, without any threat of penalty, there has been a **compliance increase of only 2 percent.**

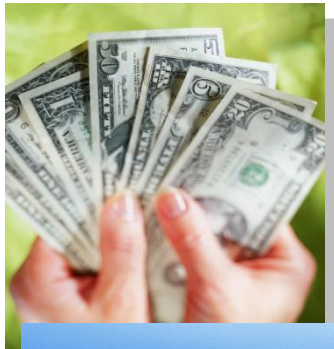
**This is not an effective way to protect your water rights and Nevada's water resource.**



# SB 274

The State Engineer may adopt regulations to impose administrative penalties which may include:

- Monetary fines
- Replacement of water
- Reimbursement of Division's enforcement expenses





# Administrative Penalties

## **NRS 533.481, 534.193, 535.200, 536.200**

- Monetary fines up to \$10,000 per day for each violation;
- Replacement of water up to 200% of that unlawfully taken.
- Full or partial reimbursement of expenses incurred by the State Engineer “in investigating and stopping the violation”.





# SB 274

**The State Engineer shall, in adopting regulations**

- Comply with the provisions of Chapter 233B of NRS.
- Consider waiving an administrative penalty for a violation if the violator has made significant progress toward correcting the violation; and



# SB 274

## **The State Engineer shall, in adopting regulations**

- Consider establishing a minimum threshold amount of water that a user of water would be required to exceed before an administrative penalty would be imposed
  - The proposed regulations provide for consideration of the relative amounts of water involved, and the methods of measurement or meter error, in determining the penalty, if any.
  - No administrative penalty will be imposed through the warning letter process directed at first time minor violations.
  - The Show Cause Hearing is a mechanism during which consideration for the severity of the exceedance and progress toward correcting the violation can be made
  - Should a penalty be assessed it can be appealed to the Independent Advisory Committee for additional consideration



# SB 274

## Additional considerations:

### The State Engineer shall, in adopting regulations

- Consider waiving an administrative penalty in the case of an unauthorized use or willful waste of water or an unlawful diversion of water if the amount does not exceed 2 acre-feet per annum
  - A blanket waiver was considered however it was determined that such a waiver would:
    - Be tantamount to a de facto water right
    - Conflict with the statutes
    - Impair existing rights
    - Be arbitrary and capricious
  - The Show Cause Hearing is the mechanism during which consideration for waiving an administrative penalty for less than 2 acre-feet per annum can be made
  - Should a penalty be assessed it can be appealed to the Independent Advisory Committee for additional consideration



# SB 274

**These proposed regulations satisfy those considerations.**



# Proposed Regulations



# Goal

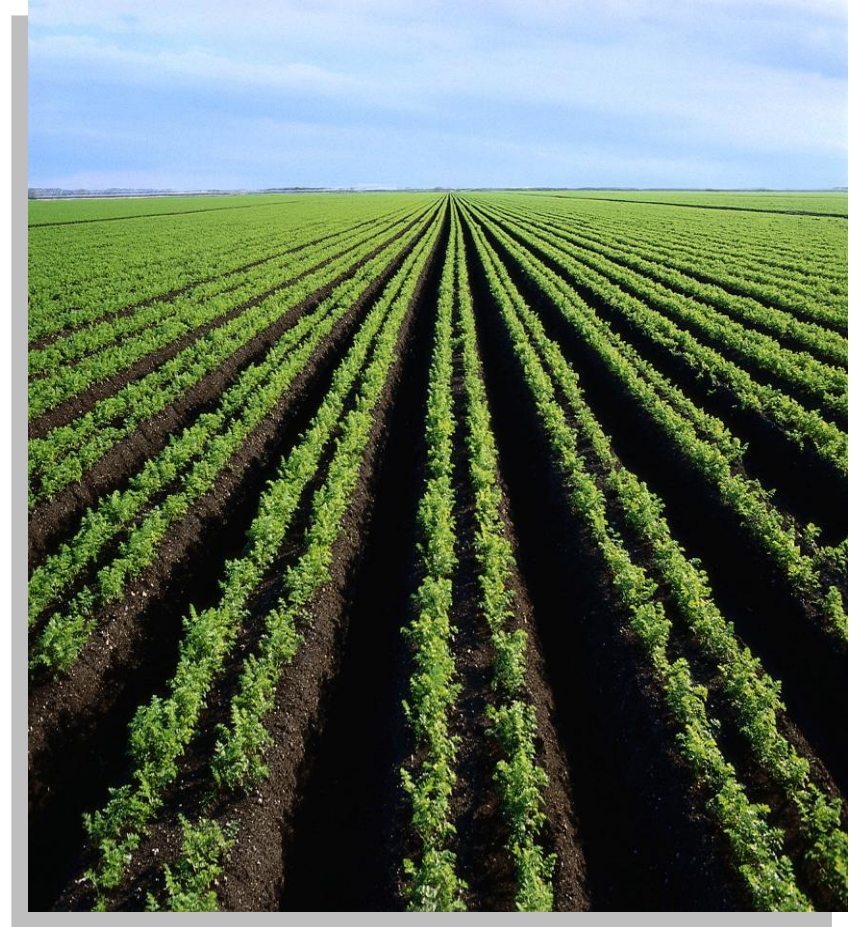
These regulations are intended to:

- **Achieve compliance of Nevada's Water Law within a framework that minimizes enforcement;**
- Assure the protection of Nevada's water resources and the public welfare by promoting compliance and deterring noncompliance with the statutes, regulations, permits, certificates, waivers and orders administered and issued by the State Engineer;
- Assure that if the State Engineer assesses any administrative penalties, it be done lawfully, fairly, and consistently.



# Examples of Violations

- Unauthorized points of diversion
- Unauthorized places of use
- Unauthorized manners of use
- Unauthorized diversion structures
- Exceedance of authorized allocation
- Failure to comply with permit terms e.g. meter installation
- Failure to comply with statutes, orders, permits, regulations or waivers.
- Failure to comply with an order or notice regarding dam safety





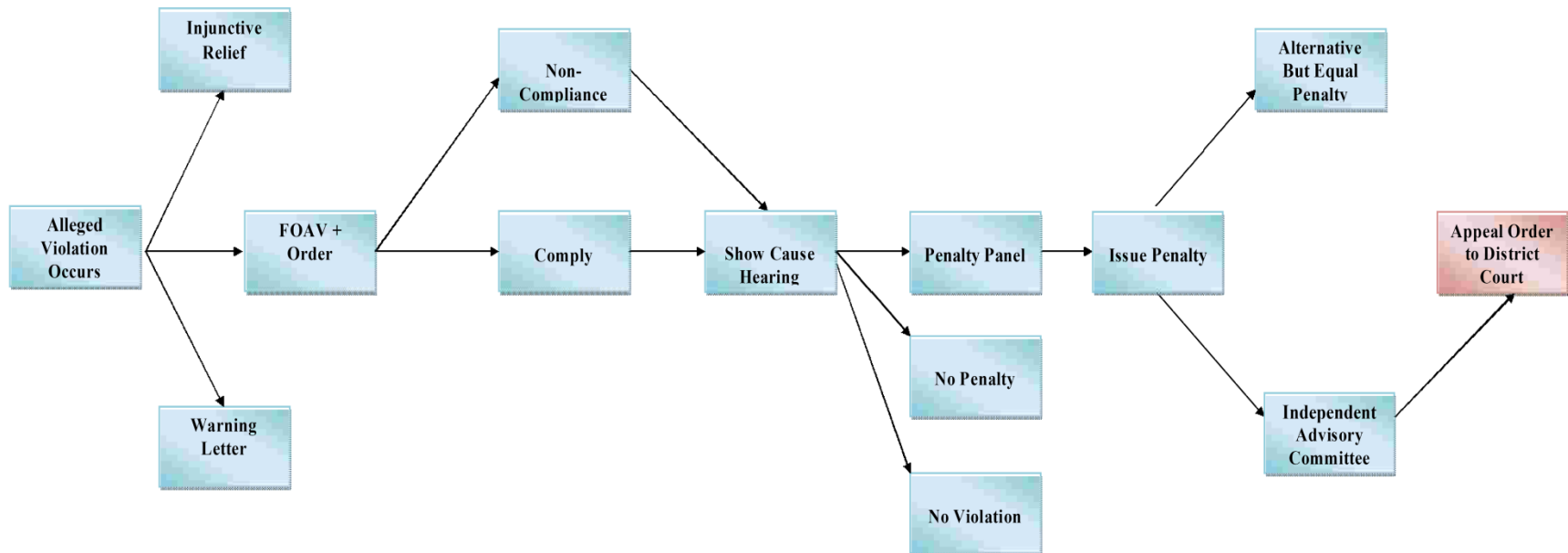
# Violations

Types of activities NOT subject to fines and penalties:

- Fines and penalties under these proposed regulations will not be pursued for violations occurring prior to July 1, 2008.
- Civil disputes between water users
- Internal disputes in water or irrigation companies
- Right-of-way, easement or trespass disputes



## Framework for How Enforcement Actions Will be Implemented Through Regulations



**Respondent and DWR may negotiate  
alternative compliance penalties at  
any time during this process!**



# Enforcement Action Process

How does an enforcement action proceed?

1. After a complaint is filed OR division staff observes a potential violation, the alleged violation is investigated further.
2. If it is found that a violation exists, a decision will be made whether to issue a:
  - a. Warning letter
  - b. Finding of Alleged Violation & Violation Order (FOAV & VO)
  - c. Notice of Injunctive Relief



# Enforcement Action

## Warning Letter

- A letter sent that sets forth the alleged violation and requests the person correct the violation within a given timeframe.



# Enforcement Action

## Finding of Alleged Violation (FOAV) and Violation Order (VO)

### FOAV

- Statement of law and jurisdiction
- Statement of alleged facts
- Alleged Violations
- Notice of possible penalty
- Notice that each day may be treated as a separate violation

### VO

- Actions that must be taken to achieve compliance
- Notice of right to contest at a Show-Cause Hearing before the State Engineer
- Set Show-Cause Hearing date



# Enforcement Action

## Show-Cause Hearing

A hearing where the respondent presents information regarding the alleged violation. It is also an opportunity for the respondent to demonstrate how he achieved, or will achieve compliance.

Information from this hearing will be used to decide whether or not:

- To send the matter to the Penalty Panel;
- Declare that although a violation occurred, no penalty will be assessed; or
- Declare that no violation occurred



# Enforcement Action

## Penalty Panel

DWR senior staff will review the facts of the case and make a penalty recommendation to the State Engineer. This process occurs after the Show-Cause Hearing and is not open to the respondent.

\* As a note, Nevada Division of Environmental Protection has this same panel make-up and process



# Enforcement Action

## Penalty Panel

If a penalty is to be issued, it will be based on the following criteria:

- The gravity of the violation, including without limitation, any economic injury or impact to other persons;
- Whether the respondent attempted to comply with any applicable orders of the State Engineer;
- Any prior violations committed by the respondent; and
- The economic benefit, if any, derived by the respondent from the violation.



# Enforcement Action

## Penalty Panel

In the case of using water in excess of that allowed by law, the State Engineer shall consider

- The relative amounts of water involved; and
- The method(s) used for the measurement of the water in question.





# Enforcement Action

## Penalty Panel

In addition to an administrative fine, the Penalty Panel may assess enforcement costs and cost of compliance inspections.

Lastly, for egregious violations where water is unlawfully used, wasted or diverted, the Penalty Panel can require the respondent to replace up to 200% of said water.



# Enforcement Action

## After a Penalty is Issued

The respondent can either:

1. Accept the penalty and its requirements
2. Negotiate an alternative but equal penalty
3. Appeal penalty to an Independent Advisory Committee



# Enforcement Action

## Independent Advisory Committee (IAC)

Made up of a minimum of three (3) members selected by the Director of the Department of Conservation and Natural Resources. The members cannot be employed by the Division of Water Resources but must be known to have water resource related experience and who will be fair and impartial. When a Penalty is appealed to the IAC, it will be reviewed and a recommendation will be made to the State Engineer to uphold, modify or overturn the order. A final order will then be issued.

Once this final order has been issued to the respondent, he may:

- Appeal the final order to district court
- Comply with the order
- Negotiate an alternative but equal penalty



# Enforcement Action

## Example 1

A community well serving 4 homes exceeds their allocation by 3 acre-feet

### Enforcement Action

- Send a warning letter for first time violations, OR
- Send a warning letter with an order for installation of individual meters

### Response 1

Individual meters are installed and individual well user demonstrates compliance

### Penalty- None



# Enforcement Action

## Example 1 (continued)

### Response 2

Individual meters are installed and one individual well user exceeds allocation past established amounts for meter error.

- Send warning letter or
- Issue Finding of Alleged Violation depending on how egregious the offense
- Respondent attends the Show-Cause Hearing and provides proof of compliance

**Penalty** - In this case, a penalty would probably not be issued.



# Enforcement Action

## Example 1 (continued)

### Response 3

The respondent doesn't show up at the hearing and continues to exceed allocation

**Penalty** - The matter would be sent to the Penalty Panel and a penalty would be assessed based on the criteria mentioned earlier.



# Enforcement Action

## Example 2

A complaint is received that a domestic well user is not within compliance, i.e. irrigating a pasture, serving multiple homes or using well for a commercial business

### Enforcement Action

- Field investigation conducted by State Engineers Office to determine if a violation is occurring.
- Send a warning letter with a time frame for compliance

### Response 1

Domestic well user demonstrates compliance

Penalty - None



# Enforcement Action

## Example 2 (continued)

### Enforcement Action – Repeat Offender

Issue Finding of Alleged Violation

#### Response 2

- The Respondent attends the Show-Cause Hearing and provides proof of compliance

**Penalty** - Depending on how egregious the offense, the matter could still be sent to a penalty panel.

#### Response 3

The Respondent doesn't show up at the show cause hearing and continues the violation

**Penalty** – The matter would be sent to the Penalty Panel and a penalty.





# Enforcement Action

## Example 3

A water right holder is irrigating 40 acres outside the permitted place of use of his 125 acre pivot.

**Enforcement Action** - Issue a Warning Letter with specified time to come into compliance.

**Response** – Respondent comes into compliance, e.g. quits irrigating the 40 acres or files a change application to move water to cover the 40 acres, etc.

**Penalty** - None



# Enforcement Action

## Example 4

A water right holder is irrigating 40 acres outside the permitted place of use of his 125 acre pivot.

**Enforcement Action** - Issue a Warning Letter with specified time to come into compliance.

**Response** - A year later, he continues to irrigate the 40 acres illegally.

**Enforcement Action** - Issue a FOAV & Order.



# Enforcement Action

## Example 4 (continued)

### Response 1

The Respondent attends the Show-Cause Hearing and provides proof that he is now in compliance and will remain so.

**Penalty** - Depending on how egregious the offense, the matter could still be sent to a penalty panel. In this case, a penalty would probably not be issued.

### Response 2

The respondent doesn't show up at the hearing and continues to irrigate the 40 acres illegally.

- The matter would be sent to the Penalty Panel and a penalty would be assessed based on the criteria mentioned earlier.

### Response 3

NDWR and the respondent may negotiate an alternative but equal penalty and the matter is settled.

**THIS LAST OPTION IS AVAILABLE AT ANYTIME DURING THE PROCESS!**<sup>35</sup>



# Enforcement Action

## Example 5

As a result of a complaint from a water user, it is found that someone placed a diversion structure in Cherry Creek and is diverting all the water, thus having an adverse effect on 23 senior water right holders lower on the system.

**Enforcement Action** - Issue a FOAV & Order

OR

Seek Injunctive Relief to have the diversion structure removed.

**Penalty** – Assess a fine. If it was further found that the respondent had water rights on the Creek, possibly require him to payback/not-use his water rights up to 200% of the water illegally diverted.



# Enforcement Action

## Example 6

During the course of field work, staff from the State Engineer's office found that a dam and reservoir had been constructed and is storing 1500 acre-feet of water without the benefit of a water right or dam permit. It is further found that the dam was constructed using subpar construction material and standards. The reservoir sits above a community of 125 people and if the dam failed, the potential for loss of life exists.



# Enforcement Action

## Example 6

**Enforcement Action** – Seek Injunctive Relief, issue a FOAV & Order, and begin a controlled breach of the dam

**Penalty** – After Show-Cause Hearing, the Penalty Panel may levy a fine of up to \$10,000 per day for at least the number of days elapsed from order to compliance and any other applicable administrative fine.



# Revisions to the Original Proposed Regulations



# Revisions

- Added “Authority”, “Application and Preamble” and “Purpose” sections to summarize the intent of the Regs
- Defined Alternative, But Equal Penalty
- Independent Advisory Committee is made up of members appointed by the Director of the Department of Conservation and Natural Resources.
- Defined the Penalty Panel
- In calculating the time period the State Engineer may use to impose an administrative fine, he shall not include time delays not caused by the respondent.





# Revisions

- The amount of the penalty assessed:
  - In the case of using water in excess of that allowed by law, the State Engineer shall consider
    - The relative amounts of water involved; and
    - The method(s) used for the measurement of the water in question.



# Where Do We Go From Here?



# Timeline For Adopting These Regulations

- Finish holding 2<sup>nd</sup> Round of Workshops
- Review Input From Workshops
- Revise Proposed Regulations if Necessary
- Hold Formal Hearing on July 24<sup>th</sup> in Carson City to Adopt Regulations
- Submit Adopted Regulations to LCB for Final Review by the Legislative Commission by January 2009
- Regulations Take Effect July 2009



## Conclusion – Q & A

*The #1 Goal of these regulations  
are to Achieve compliance of  
Nevada's Water Law within a  
framework that minimizes  
enforcement*